IN THE MISSOURI SUPREME COURT

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No. SC 85460

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KENNETH L. KUBLEY,
Appellant-Respondent,

v.

MOLLY M. BROOKS,
Respondent/Cross-Appellant,

and

DIRECTOR OF THE DIVISION OF CHILD SUPPORT ENFORCEMENT,
DEPARTMENT OF SOCIAL SERVICES,
Respondent/Cross-Appellant.

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Appeal from the Circuit Court of Phelps County, Missouri
The Honorable Ralph J. Haslag, Judge

_____

REPLY BRIEF OF RESPONDENT/CROSS-APPELLANT DIRECTOR OF THE DIVISION OF CHILD SUPPORT ENFORCEMENT, DEPARTMENT OF SOCIAL SERVICES

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Reply as Appellant In Support of DCSE's Point I

In its Point I, the Division of Child Support Enforcement (DCSE) argues that their administrative actions were valid because the agency had authority to establish a child support order and then, later, to administratively modify it because there had been no previous child support order. As to this point, the most important fact is the circuit court's specific finding that "[t]here was no order for Ms. Brooks to pay child support in the amended Decree of Dissolution of Marriage entered in 1994." (L.F. 104). Because there was no order for Ms. Brooks to pay any amount of child support, Section 454.470.1 RSMo. applied to allow entry of an administrative order establishing a child support obligation. *See Dye v. Division of Child Support Enforcement*, 811 S.W. 2d 355, 360 (Mo. banc 1991); *Binns v. Missouri Div. of Child Support*, 1 S.W. 3d 544, 547 (Mo. App. E.D. 1999). Certainly there was no enforceable support obligation, because the circuit court had not ordered "payment of a set or determinable amount" as required by § 454.460(2), RSMo. Accordingly DCSE was authorized to issue the Notice and Finding of Financial Responsibility. *See State ex rel. Hilburn v. Staeden,* 91 S.W. 3d 607, 609-10 (Mo. banc 2002).

Ms. Brooks cites several cases in an attempt to argue that *Dye* does not apply "if a trial court has addressed the issue of child support." Br. at 28. But these decisions are inapplicable. In *Shockley v. Division of Child Support,* 980 S.W 2d 173 (Mo. App. E.D. 1998), the Court held that ordering a child support payment of $0 was a set or determinable amount for purposes of § 454.460(2). *Id*. at 175. Ordering payment of $0 is different from

"no order for Ms. Brooks to pay child support." (L.F. 104). In *Binns v. Missouri Division of Child Support Enforcement*, 1 S.W. 3d 544 (Mo. App. E.D. 1999), the trial court there found that "neither party is obligated to the other as and for child support," *id*. at 547, which the Court believed was an order of $0, and as such was a "set and determinable amount." *Id.* Here, both parties were required to support their minor children (L.F. 5), but there was no order of a "set or determinable amount." Finally, Ms. Brooks relies on *Garcia-Huerta v. Garcia*, 108 S.W. 3d 684 (Mo. App. W.D. 2003). While DCSE believes *Garcia-Huerta* was wrongly decided, even if the case were correct, it is distinguishable. In *Garcia-Huerta*, the circuit court did issue a child support order of a specific amount, but not against Mrs. Garcia-Huerta. *Id*. at 686. Here, there was never a child support order of a specific amount against anyone, and, accordingly, the Director was entitled to establish one.

In another lengthy section of her brief, Ms. Brooks argues that the circuit court could not really have meant what it said when it found that there was "no order for Ms. Brooks to pay child support." Br. at 30-32. Ms. Brooks speculates about what the circuit court might or might not have been thinking when it issued the judgment that is the subject of this appeal. But a Court speaks through its records. *See State ex rel. Nassau v. Kohn*, 731 S.W. 2d 840, 843 (Mo. banc 1997); *Thornton v. Deaconess Medical Center-West Campus*, 929 S.W. 2d 872, 873 (Mo. App. E.D. 1996). Idle speculation about what the circuit court may have been thinking is not part of the record and, thus, is irrelevant.

The same idle speculation is at play in another irrelevant portion of the brief, where Ms. Brooks challenges DCSE's practice of collecting child support from parents who

refuse to support their children. Br. at 31-33. This Court has already upheld the constitutionality of DCSE acting when there is no enforceable support order. *See Hilburn*, 91 S.W. 3d at 610. Accordingly, Ms. Brooks' critique of the agency is off the mark.

Ms. Brooks also attempts to confuse the issue by arguing that DCSE should have followed the procedure for a modification, to which a different statutory section, with different rules, would have applied. Br. at 43-46. Ms. Brooks then goes through a lengthy and unhelpful recitation of the procedures followed in, and cases relevant to, modification of Court orders, not establishment of administrative orders. But that section of Ms. Brooks' brief is directed at the wrong issues and is thus entirely irrelevant to the issue before this Court. This case concerns an administrative establishment order, not a modification of a Court-ordered child support amount. This Court in *Hilburn* unanimously held that the establishment procedures set forth in RSMo. §§ 454.470 and 454.490 are constitutional. 91 S.W. 3d at 609-10. Accordingly, the cases cited by Ms. Brooks are not relevant to the resolution of this issue.

Later in her brief, Ms. Brooks appears to argue a fallback position--that even if the 1994 administrative establishment orders were valid, the December 1996 modification (L.F. 21-22) was not. Br. at 46-47.[1] But Ms. Brooks ignores RSMo Section 454.500,

[1] Ms. Brooks goes so far as to accuse DCSE of not raising any issue as to the December 6, 1996 order before. Br. at 26, 47. DCSE challenged the entire award from the circuit court in his brief below. *See* Brief of Respondent/Cross-Appellant Director of the

which sets forth a procedure for the director to modify previously entered administrative orders:

> At any time after the entry of an order pursuant to sections 454.470 and 454.475, the obligated parent, the division, or the person having custody of the dependent child may file a motion for modification with the director.

RSMo Sect. 454.500.1. The statute then goes on at length to set forth the procedure for such modifications. Appendix at 6-7. The December 1996 modification was valid.

Reply as Appellant in Support of DCSE's Point II

In Point II, DCSE argued that the circuit court erred in entering judgment against

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Division of Child Support Enforcement, Department of Social Services, pgs. 13-14. The December 6, 1996 order was also discussed in the Reply Brief of Respondent/Cross-Appellant Director of the Division of Child Support Enforcement, Department of Social Services, pg. 5, filed with the Court of Appeals for the Southern District, in response to an argument apparently raised by Ms. Brooks.

DCSE on a claim for money had and received, because the State has not waived sovereign immunity to such actions. In response, Ms. Brooks goes into a lengthy attempt to discuss the history of sovereign immunity in both Missouri and in England throughout the centuries without really making a salient point. Br. at 50-52.

Ms. Brooks appears to argue that sovereign immunity only applies to actions sounding in negligence. *See* Br. at 48-49. If that is the argument, it has been rejected time and time again by Missouri courts, which have held that sovereign immunity applies even to intentional torts. *See Browning v. White*, 940 S.W. 2d 914, 919 (Mo. App. S.D. 1997); *Mitchell v. Village of Edmundson*, 891 S.W. 2d 848, 850 (Mo. App. E.D. 1995) ; *Balderee v. Beeman*, 837 S.W.2d 309, 316 (Mo. App. S.D. 1992); *Conrod v. Missouri State Highway Patrol*, 810 S.W. 2d 614, 617-18 (Mo. App. S.D. 1991); *Duncan v. Creve Coeur Fire Protection Dist.*, 802 S.W.2d 205, 207 (Mo. App. E.D. 1991); *Carmelo v. Miller*, 569 S.W. 2d 365, 367-68 (Mo. App. E.D. 1978). Thus, sovereign immunity should bar the claim.

The cases Ms. Brooks cites in this section of the brief, save *Palo v. Stangler*, 943 S.W. 2d 683 (Mo. App. E.D. 1997),[2] do not involve a state actor in an analogous situation. *Teachers Credit Union v. Olds*, 553 S.W. 2d 545 (Mo. App. W.D. 1977) involved a credit union and an employee's husband, not a state agency or official. *Id.* at 546. The defendant in *Webster v. Sterling Finance Co.*, 173 S.W. 2d 928 (Mo. 1943), was a finance company,

[2] DCSE discussed *Palo* at length in its opening brief at pgs. 18-23.

not a state agency or official. To the extent *Teachers Credit Union* and *Webster* relate to private actors they may well be good law, but they have no application to the sovereign immunity issue before this Court. As for *Karpierz v. Easley*, 31 S.W. 3d 505, 510-11 (Mo. App. W.D. 2000), the Court of Appeals for the Western District has just acknowledged that the dicta in that case was erroneous in *State ex rel. Missouri State Highway Patrol v. Atwell*, 2003 WL 22433306 (Mo. App. W.D.):

> In prior cases our Supreme Court has held that the doctrine of sovereign immunity does apply to actions for money had and received. *Kleban v. Morris*, 363 Mo. 7, 247 S.W. 2d 832 (Mo. 1952), and *Gas Service Co. v. Morris*, 353 S.W. 2d 645 (Mo. 1962). We believe we were incorrect when we spoke so broadly and in dicta that sovereign immunity was not even an issue in non-tort cases.

Atwell, 2003 WL 22433306 at *2. Accordingly, *Karpierz* is no longer of any assistance to Ms. Brooks.

Finally, Ms. Brooks' argument that there are implicit common law exceptions to sovereign immunity is not relevant, because of this Court's decisions in *Gas Service Company* and *Kleban*. At common law, there was no viable money had and received theory against the State.

Accordingly, the money had and received theory is inapplicable to the State.

Reply As Appellant in Support of DCSE's Point III

Ms. Brooks also claims that the estoppel by compliance doctrine should not apply

because Ms. Brooks was required to comply with the decree by the threat of a sanction, including incarceration. In its opening brief DCSE pointed out that every agency or court order is backed up by some sort of sanction for non-compliance, including, sometimes, the threat of incarceration. *See* DCSE Br. at 25-26. To hold otherwise would vitiate the estoppel by compliance doctrine, as it would hardly ever apply to a Court judgment.

The cases cited by Ms. Brooks are readily distinguishable. In *Wampler v. Director of Revenue*, 48 S.W. 3d 32 (Mo. banc 2001), the court rejected applying the estoppel by compliance argument to the Director of Revenue when the Director reinstates driving privileges pursuant to a court order and then chooses to pursue an appeal. *Id*. at 34-35 ("It would be an absurd result not intended by the legislature to require that the director risk being held in contempt of court in order to preserve the right to appeal in cases such as this"). That fact situation is not present in this case. Ms. Brooks could have paid the child support she was ordered to pay, and simply moved to modify her child support obligation at the same time, under RSMo § 454.500.

In *Two Pershing Square, L.P. v. Boley*, 981 S.W. 2d 635, 638-39 (Mo. App. W.D. 2000), the Court held that an appeal was not moot simply because the judgment had been paid to avoid an interest penalty. *Id.* at 638-39. The estoppel by compliance doctrine discussed here and in DCSE's opening brief was not directly at issue. Again, Ms. Brooks could have paid the child support she was ordered to pay and moved to modify her support obligation under RSMo. § 454.500.

In *McIntosh v. McIntosh*, 41 S.W. 3d 60, 67 (Mo. App. W.D. 2001), the Western District noted that it was inclined to apply the general rule as to acquiescence, but chose not to dismiss the appeal because there may have been confusion "as to whether to regard the terminal and non-modifiable maintenance award as an adjustment of marital property rather than as a form of maintenance." *Id.* (internal quotation and footnote omitted). That is far different from the issue in this case. There could have been no confusion on Ms. Brooks' part as to whether her child support obligation was being increased.

In *Feinberg v. Feinberg*, 676 S.W. 2d 5, 8 (Mo. App. E.D. 1984), the issue concerned whether acceptance of partial payment was inconsistent with a request for redistribution of assets or maintenance, which, again, is not the issue here. *Jezewak v. Jezewak*, 3 S.W. 3d 860 (Mo. App. E.D. 1999) arises out of a context similar to that in *Feinberg*. The Court in *Jezewak* merely held that a former husband's motion for contempt to require his former wife to provide him with assets he was awarded under a dissolution decree was not inconsistent with his appeal seeking even more assets, and thus there was no basis for estoppel. *Id.*, 3 S.W. 3d at 863-64. *Feinberg* and *Jezewak* have no application to this case.

Ms. Brooks also argues that DCSE asserted the defense of estoppel too late. But she fails to recognize her own responsibility for any delay. As the circuit court found, "the actual relief being requested in Ms. Molly M. Brooks' Third Amended Counter Motion to Modify Decree of Dissolution of Marriage filed on April 13, 1998 as to Counts III, IV, V, VI, VII and VIII was, to some extent, nebulous and blurred. Coincidentally, Defendants'

responsive pleadings or, perhaps, lack thereof, were in the same category." (L.F. 104). DCSE did raise the estoppel issue prior to trial in their Supplemental Motion to Dismiss filed April 18, 2001 (L.F. 60), and it was properly before the circuit court.

In the Event That Any Damages Were Awardable, the Circuit Court Did Not Abuse its Discretion by Not Awarding Ms. Brooks More Than It Did [responds to Point II of Ms. Brooks' Brief as Appellant].

Standard of Review

This point concerns the adequacy of the damage award. A damage award from a trier of fact is conclusive unless the award is so shockingly inadequate as to indicate that it is the result of passion and prejudice or a gross abuse of discretion. *Havel v. Diebler*, 836 S.W. 2d 501, 504 (Mo. App. W.D. 1992). There is a large range between the damages extremes of inadequacy and excessiveness, and courts will allow a trier of fact virtually unfettered discretion if the damages are within that range. *See Graham v. County Medical Equipment Company, Inc.*, 24 S.W. 3d 145, 148 (Mo. App. E.D. 2000).

Argument

In the event that DCSE's points on appeal are rejected, *Havel* and *Graham* dispose of Ms. Brooks' argument that the damages awarded by the Court against DCSE were inadequate. The main item of damages sought by Ms. Brooks was the repayment of the amounts she alleged were wrongfully withheld by DCSE. With regard to Ms. Brooks's unfortunate jailing, the circuit court specifically found "that Defendant Director of the Division of Child Support Enforcement, Department of Social Services, State of Missouri

could not have anticipated the illegal acts set forth above." (L.F. 106). Accordingly, by refusing to order any damages other than repayment against DCSE, the circuit court did not grant shockingly inadequate damages. Certainly, the award falls into the large range between the extremes of inadequacy and excessiveness.

Ms. Brooks makes a vague and theoretical argument suggesting that somehow the State breached some sort of a social contract with Molly. But she makes no effort to argue that the circuit court erred in making the finding that DCSE could not have anticipated Molly's jailing.

Ms. Brooks also takes issue with the circuit court's use of the intervening factors analysis. **This Court has held that in deciding questions of proximate cause and intervening cause, each case must be decided on its own facts and one decision seldom controls another. *See Krause v. U.S. Truck Co., Inc.*, 787 S.W.2d 708, 710 (Mo. banc. 1990). The issue of intervening cause typically arises in negligence cases where a court is required to evaluate the merits of an argument over whether an event that interrupts a defendant's negligence is an intervening cause, *i.e.*, a new and independent event that becomes the responsible, direct and proximate cause of injury. *See, e.g. Stroot v. Taco Bell Corp.*, 972 S.W. 2d 447, 449 (Mo. App. E.D. 1998). If events subsequent to a negligent act are surprising or unexpected or freakish, "'they may not be the natural and probable consequence of a defendant's action.'" *Id.*, quoting *Callahan v. Cardinal Glennon Hosp.*, 863 S.W. 2d 852, 865 (Mo. banc 1993).**

By holding that DCSE could not have anticipated Ms. Brooks' jailing, the Court essentially found it to be unexpected or surprising that the prosecutor would have caused the jailing of Ms. Brooks for five days. Even Ms. Brooks admits that it was odd that those proceedings took place before a different judge. Br. at 10.

Accordingly, there is no basis to order increased damages against DCSE.

Conclusion

For the reasons stated above and in DCSE's opening brief, the circuit court's judgment should be reversed to the extent it awarded damages to Ms. Brooks.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that two copies and a diskette containing such were served by mailing copies thereof, via U.S. Mail, this 21st day of November, 2003, to:

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 84.06(c), the undersigned certifies that Respondent/Cross-Appellant Director of the Division of Child Support Enforcement, Department of Social Services' Reply Brief is in compliance with the limitations contained in Rule 84.06(c); that said Reply Brief contains 2,442 words; and that the diskette which contains said Reply Brief has been scanned and is virus free.

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Assistant Attorney General

Appendix

RSMo § 454.470.....A-1

RSMo § 454.490.....A-4

RSMo § 454.500.....A-6